No. 17-333

# In the Supreme Court of the United States

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, *and* SHARON STRINE,

*Plaintiffs-Appellants,*

v.

LINDA H. LAMONE, *State Administrator of Elections, and* DAVID J. MCMANUS, JR., *Chairman of the Maryland State Board of Elections*

*Defendants-Appellees.*

**On Appeal from the United States District Court for the District of Maryland**

## APPELLANTS' REPLY IN SUPPORT OF THEIR MOTION FOR EXPEDITED CONSIDERATION OF APPELLANTS' JURISDICTIONAL STATEMENT AND FOR EXPEDITED MERITS BRIEFING AND ORAL ARGUMENT IN THE EVENT THAT THE COURT NOTES OR POSTPONES PROBABLE JURISDICTION

We established in the motion the need for expedited treatment of this appeal, for three reasons. First, allowing the appeal to proceed in the normal course would risk running down the clock, possibly precluding the relief that plaintiffs seek. Second, this case would give the Court a fuller basis upon which to consider partisan gerrymandering, alongside *Gill* v. *Whitford*, No. 16-1161. And finally, to draw out this already long-pending litigation any longer than necessary would be inconsistent with the purposes underlying the Three-Judge Court Act. The State's rejoinders are unpersuasive.

1. The State's principal response—that plaintiffs have litigated this case in an "unhurried way" and invited delay (Opp. 1-3, 7-8)—is bewildering.

As the State observes (Opp. 3), this Court issued its pervious decision in this case on December 8, 2015. See *Shapiro* v. *McManus*, 136 S. Ct. 450 (2015). But this Court's judgment returning the case to the court of appeals did not issue until January 11, 2016. The Fourth Circuit's mandate, in turn, did not issue until February 3, 2016. See Dkt. 37. Chief Judge Traxler appointed the current three-judge panel on February 18, 2015 (Dkt. 42), and plaintiffs filed their second amended complaint less than two weeks later, on March 3, 2016 (Dkt. 44). The State's suggestion (Opp. 3) that "plaintiffs waited four months" after this Court's opinion before filing the amended complaint is therefore misleading.

The State's more general suggestion (Opp. 7) that we have "conveyed to the district court [a] determination that [the] need for relief was not urgent" is not true to the course of the proceedings below. We have litigated this case as speedily as possible since returning to the district court, seeking an expedited schedule (*e.g.* Dkt. 103) and frequently filing papers early. We also have repeatedly stressed to both the State and the district court the urgent nature of the litigation:

- We did so at *every* hearing before the three-judge court. At the hearing concerning legislative privilege, for example, counsel for plaintiffs explained: "[A]s the Court knows, we've been trying to push this case along as quickly as possible" and "[w]e're very concerned that if [depositions] get pushed until after April," it may be "too late for us to get a remedy in time to make a difference for the upcoming primaries." 3/6/17 Hrg. Tr. 37:4-38:15.

- We have taken the same position in nearly all of our written filings before the district court. Seeking the full court's intervention when the State declined to abide Judge Bredar's discovery orders, for example, we stated: "As we have explained from the start, time is of the essence in this case" given the need to "enact a new map in time for the 2018 primary election cycle." See Dkt. 135, at 2. In another example, when the district court ordered re-briefing of the legislative privilege issue, we stressed the need for "as prompt an order as possible" because "every additional day of delay" threatens our ability to obtain relief "in time to affect the 2018 primaries." Dkt. 152, at 2.

The State's assertion (Opp. 8) that plaintiffs are responsible for delaying the proceedings below is also incorrect. To be sure, the proceedings have not moved as quickly as we might have wished. But the delay has been the consequence of (a) the State's unflagging resistance to nearly every discovery request that we served (requiring multiple rounds of briefing on numerous issues, on top of an oral argument before the full three-judge court), and (b) the pendency of the Maryland General Assembly's legislative session through April of this year. See *Benisek* v. *Lamone*, 241 F. Supp. 3d 566, *9 n.11 (D. Md. 2017) (granting plaintiffs' motions to compel but allowing sitting legislators "to postpone their depositions until after the conclusion of the regular session of the General Assembly on April 10, 2017").

2. The State notes (Opp. 2-3) that plaintiffs did not move for a preliminary injunctions in either 2013 for the 2014 election, or in 2015 for the 2016 election. That is true but irrelevant. The initial complaint was filed in November 2013 and quickly dismissed by Judge Bredar. The case was pending before the court of appeals when the 2014 primaries took place.

The case returned to the district court on February 3, 2016—the same day as the 2016 declaration-of-candidacy deadline, and just four weeks before the certification and printing of the ballots. See Maryland State Bd. of Elections, *2016 Presidential Election Calendar*, perma.cc/679T-BEBU. It would not have been possible to litigate and resolve a preliminary injunction motion, the State's legislative privilege arguments, and a new map in so short a time. The State hardly could disagree; its position before this Court is that even "eight months" is insufficient an amount of time to obtain relief. See Opp. 10.

3. The State takes issue with our argument concerning the Three-Judge Court Act, noting (Opp. 9) that the Act does not, in itself, "demand accelerating the procedures that normally govern the Court's consideration of an appeal." That misses the point, which is that this case already has been pending for an unusually lengthy period of time. That has been primarily thanks to the Fourth Circuit's now abrogated rule allowing single-judge courts to dismiss complaints otherwise required to be heard by three-judge courts. See *Shapiro*, 136 S. Ct. at 455-456 (abrogating *Duckworth* v. *State Admin. Bd. of Election Laws*, 332 F.3d 769 (4th Cir. 2003)).

Our point is simply that, to permit yet further delay of this already drawn-out litigation would run counter to the acknowledged purpose of the Act, which is to "accelerat[e] a final determination on the merits" in important cases. *Swift & Co.* v. *Wickham*, 382 U.S. 111, 119 (1965). The State does not disagree, either with this point or our observation that pendency of this action has cast harmful uncertainty over Maryland congressional politics.

4. Citing the majority opinion for support, the State asserts (Opp. 11) that relief is already a "practical impossibility." But the State takes the majority's statement out of context; in explaining its decision to stay the litigation pending this Court's decision in *Gill*, the majority was speaking about the impossibility of completing discovery and holding a full trial in time to award relief prior to the 2018 elections. See J.S. App. 31a. We do not disagree with that perspective, which is why we moved for preliminary relief in the first place.

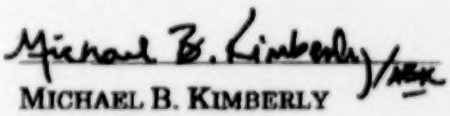
So far as preliminary relief is concerned, there remains adequate time, as we demonstrated in the motion (at 7). The State says (Opp. 12) that such relief would introduce "extreme disruption" to Maryland's election procedures, but that is an over-

statement. The State cites just a single additional deadline that would need to be extended, and it does not disagree that courts have granted relief under such circumstances in the past. See Motion 7 n.1. There is no reason to think the same is not possible here.

For these reasons given above and in the motion, the request for expedited treatment should be granted.

September 12, 2017

Respectfully submitted.



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